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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1111

ROBERT MUSE, *Petitioner*

v.

STATE OF NORTH CAROLINA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA

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TABLE OF CONTENTS

	Page
Opinion Below	1
Jurisdiction	1
Questions Presented	2
Constitutional Provisions Involved	2
Statement of the Case	3
Reasons for Granting the Writ	9
Conclusion	27
Appendix:	
Exhibit 1—Judgment of the Court of Appeals of North Carolina	1a
Opinion of the Court of Appeals of North Carolina	2a
Exhibit 2—Judgment of the Supreme Court of North Carolina	5a
Opinion of the Supreme Court of North Carolina	6a
Exhibit 3—Order of the General Court of Justice, Superior Court Division, dated January 22, 1972	18a

INDEX OF CITATIONS

Carnley v. Cochran, 369 U.S. 506, 82 S.Ct. 884, 8 L.Ed. 2d 70 (1962)	19
Chapman v. California, 386 U.S. 18, 17 L.Ed. 2d 705, 87 S.Ct. 824 (1967)	26
Fahy v. Connecticut, 375 U.S. 85, 84 S.Ct. 229, 11 L.Ed. 2d 171	26
Haynes v. Washington, 376 U.S. 503, 10 L.Ed. 2d 513	12
Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938)	19
Miranda v. Arizona, 384 U.S. 436, 16 L.Ed. 2d 694, 86 S.Ct. 1602	12, 13, 14, 16, 25
Payne v. Arkansas, 356 U.S. 560, 2 L.Ed. 2d 975	12
State v. Bishop, 272 N.C. 283, 158 S.E. 2d 511 (1968)	23
State v. Blackmon, 280 N.C. 42	25

Page

State v. Fox, 277 N.C. 1 (1970) 14
State v. Fuqua, 269 N.C. 223, 152 S.E. 2d 68 (1967) ..15, 22
State v. Gibson, 2 N.C. App. 187, 162 S.E. 2d 627 (1968) 22
State v. Hammer, 240 N.C. 85, 81 S.E. 2d 193 (1954) .. 14
State v. Mills, 6 N.C. App. 347 (1969) 24
State v. Roberts, 12 N.C. 259 23
State v. Thorpe, 274 N.C. 457, 164 S.E. 2d 171 (1968) . 18
State v. Woodruff, 259 N.C. 333, 130 S.E. 2d 641 (1963) 22
Thomas v. Arizona, 356 U.S. 390, 2 L.Ed. 2d 863, rehearing denied 357 U.S. 944, 2 L.Ed. 2d 1557 12
U. S. v. Blalock, 255 F. Supp. 268 (E.D. Pa. 1966) ...19, 20
U. S. v. Hucinich, 404 F.2d 262 (1968) 24
Watts v. Indiana, 338 U.S. 49, 69 S.Ct. 1347, 93 L.Ed. 1801, 1805 22

21 Am. Jur. 2d, Criminal Law, Sec. 219, at 259 18
29 Am. Jur. 2d, Evidence, Sec. 614 17
29 Am. Jur. 2d, Evidence, Sec. 529 18

Constitution of the United States:
Amendment V 2, 12
Amendment XIV 2

28 U.S.C. 1257(3) 2

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STATE OF NORTH CAROLINA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA

The petitioner, Robert Muse, prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of North Carolina, entered in the above entitled case on December 27, 1971.

OPINION BELOW

The opinion of the Court of Appeals of North Caroline (Intermediate Appellate Court) is recorded at 11 N. C. App. 389. The opinion of the Supreme Court of North Carolina is recorded at 280 N. C. 31.

JURISDICTION

The judgment of the Court of Appeals was entered on June 7, 1971, and a copy thereof is appended to this Petition as Exhibit 1. The judgment of the Supreme

Court of North Carolina was entered on December 27, 1971, and a copy thereof is appended to this Petition as Exhibit 2. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

QUESTIONS PRESENTED

1. Did the Trial Court err in its voir dire findings and in allowing into evidence incriminating statements amounting to a confession of the petitioner when he was never advised of his Constitutional rights?

2. Did the confession of the petitioner emanate from mental coercion in the form of hope of reward?

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT V, CONSTITUTION OF THE UNITED STATES

"No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

AMENDMENT XIV, CONSTITUTION OF THE UNITED STATES

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the

privileges or immunities of citizens of the United States; nor shall any state deprive any person of life; liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

The petitioner was charged in a bill of indictment with breaking and entering a building occupied by City Motor Parts, Inc. of Elizabeth City, North Carolina, with larceny of personal property located therein, and with receiving stolen goods, knowing them to be stolen. The bill of indictment was returned in Pasquotank County; on Motion of the petitioner for a Change of Venue, the case was transferred to the Superior Court of Camden County for trial, and the petitioner was tried at the September 1970 Session of the Superior Court held in Camden County. The petitioner was tried only upon the felony of receiving stolen goods. He pleaded not guilty. From a verdict of guilty and judgment that the petitioner be confined in the State's prison for a term of not less than five (5) nor more than seven (7) years, the petitioner appealed to the Court of Appeals of North Carolina. The Court of Appeals of North Carolina ordered a new trial, copy of its opinion being appended hereto as Exhibit 1, as aforesaid. The Supreme Court of North Carolina allowed respondent's petition for writ of certiorari and reviewed the decision of the Court of Appeals of North Carolina and reversed the decision of the Court of Appeals of North Carolina. A copy of the opinion of the Supreme Court of North Carolina is appended hereto as Exhibit 2, as aforesaid.

The facts material to the consideration of the questions presented are concerned with the testimony

of O. L. Wise, an officer employed by the State Bureau of Investigation, and the voir dire findings and conclusions of the Trial Judge thereon, as hereinafter set forth from the record, pages 48 through 57 inclusive:

"My name is O. L. Wise. I am employed with the State Bureau of Investigation and I have been so employed since 1962. Subsequent to May 3, 1969 I had occasion to see and talk to the defendant, Robert Muse, in the Pasquotank County jail. Mr. Muse sent for me and in response to his request I went to the jail where I had a conversation with him.

OBJECTION.

BY THE COURT: Ladies and Gentlemen of the Jury, it is almost five o'clock. I am going to excuse the jury until 9:30 tomorrow morning. The Court will have to rule on the objection just made out of your presence. During the evening recess, and while you are away under no circumstances are you to discuss this case, or allow anyone to discuss it in your presence, and the Court impresses upon you it is necessary that your verdict be one that is arrived at impartially. You have not yet heard all of the evidence, or argument of counsel, and charge of the Court.

The Jury then left the Courtroom, and the following ensued in the absence of the Jury:

DIRECT EXAMINATION OF O. L. WISE BY SOLICITOR SMALL ON VOIR DIRE:

BY SOLICITOR SMALL:

Q. Mr. Wise, when you went to see Mr. Muse, will you tell us how the conversation was initiated?

A. Yes, sir.

Q. What date was this, please?

BY MR. BALL: OBJECTION.

BY THE COURT: Your OBJECTION is in the record, and I have not ruled. At this point I consider that all of what he is covering is under your OBJECTION.

O. L. WISE ON VOIR DIRE CONTINUES: It was on June 12, 1969 when I went to see Mr. Muse and this was when the conversation was initiated. I went to the jail, and the jailer let me in, and I walked back to the cell where Mr. Muse was incarcerated, and Mr. Muse told me that he was now in jail under a $5,000.00 bond, appearance bond; that he didn't understand why his bond was as high as it was; that he had a family and could not support his family by being in jail, and he could not employ counsel unless he could get out of jail and go to work; that he had a job in Virginia, and that if he could not get back to his job that his job would be terminated, and he asked me to contact the judge and see if he could get his bond reduced so that he could make bond and go to work. He asked me to contact Judge Horner, and I attempted to contact Judge Horner and he was not in town; he was out of the County holding court in the western part; I went back and told him this and told him that it was nothing I could do, and he told me—we continued to talk. He constantly stated to me that he did not understand why his bond was so high, and kept insisting that I help him to do something to get the bond lowered and he indicated to me that he did not break in and enter into the building; that he purchased the tools. I had several conferences with him between the dates of June 12 and July 15. I had numerous conferences with him.

He sent for me and after I could not contact Judge Horner I went back to jail and advised him that I could not contact Judge Horner. I told him then, he indicated he might have some information that would be of interest and value to

me in other cases and I told him at that time that I was a police officer and naturally was interested in any crimes committed in the area or elsewhere and that anything of interest he could help me with I would appreciate it. He still wanted me to help assist in getting the bond lowered. I told him on numerous occasions that I was a police officer and that he knew I could not make him any promises, and that if he gave me any information in solving any cases that I would let it be known. He told me that he purchased tools from other people and he also told me that he has some information on a car that I was interested in. I did not interrogate him about the b eak-in nor did I initiate the discussions. He told me on numerous occasions he didn't break in the City Motor Parts. He did not tell me who he bought the tools from that he sold to Calvin Hudson. He said he paid $90 for them on one of these occasions in jail between June 12 and July 15. He might have told me when he purchased them but I don't know. I did not caution him of any of his constitutional rights other than mentioning that I was a police officer and that I could not promise him anything. I did not caution him of his constitutional rights because I didn't go to the jail to interrogate him about any particular thing. I went there at his request. He was in custody and he was under arrest and I knew that fact. The statements he gave me were voluntary on his part without prompting by me.

I did not request him to make a statement concerning the break-in at the City Motor Parts. On numerous occasions I told him if he had any information that would assist me in any investigation I would appreciate it. We talked about stolen vehicles and on one occasion I believe he told me he purchased the tools in his yard. I presume he volunteered the information, he called me and sent for me and I went down and talked to him

on a number of occasions. I went down and asked what he wanted and he related what facts he wanted to me. We talked about a number of things. I do not have notes of each of these conferences. Each time he would send for me and I would go down and he wanted to know if I had found out anything and I would tell him exactly. I have been down there on other occasions and he would give me certain portions of information on other things other than this, then I would go back down there and he would want to know if I had found out anything about that information. I made several trips down there to talk to him and all of these trips were a result of his request to see me. All of the information that he supplied me was volunteered by him when I responded to his request to go and see him. There were other people in the jail but none that I can remember participating in my conversation with him. He supplied me information relative to another type of crime of larceny and with information we ran down an automobile that had been found abandoned and burned, the motor removed and found the motor in an automobile. This was as a result of information he supplied me.

We talked about breaking and entering of Wood's Esso. He produced a new autombile inspection sticker and told me it came from Wood's Esso. He told me where he obtained it. He told me it was obtained during the course of a break-in and entering of Wood's Esso by some other person. He did tell me who he obtained it from. My conversation and questioning with the defendant was relative to obtaining information concerning these other crimes when I went to see him. It was during the course of these conversations that he related to me the fact that he had purchased the tools he had sold Mr. Hudson, from a third party, and that he had paid

$90 for them. I did not in any way solicit that information from him and had no knowledge it was coming until he told me. Thereafter I saw no need to caution him of his constitutional rights. I have known Mr. Muse for several years and I know him to be an intelligent man, as far as I know. I do not have any knowledge of his education. I know he is a steel tier doing construction work. I know he works on his own car some. I have seen him tinkering and working on it but to what extent I don't know.'

At the close of the voir dire hearing, the Trial Judge, inter alia, found: (lettering indicates portions excepted to and considered in the North Carolina Appellate Courts, Record Pages 53 through 57, inclusive)

"(7) No 'Miranda warning' was given to the defendant by Mr. Wise. At the time of the alleged conversation the defendant was under arrest and was in custody. *C* Mr. Wise did not request the defendant to make a statement concerning the alleged breaking and entering of City Motor Parts, Inc., and larceny of tools therefrom. The information and above statements of the defendant were volunteered on the occasions when he called for Mr. Wise and when Mr. Wise talked to him at his request in the Pasquotank County Jail. *D*

E (8) Mr. Wise did not solicit information from the defendant concerning the City Motor Parts, Inc. case. *F*

G (9) This was not a custodial interrogation, wherein the questioning was initiated by a law enforcement officer after the person had been taken into custody, or otherwise deprived of his freedom of action. *H*

The Court then concluded:

> *M* (a) The statements made by the defendant on the occasions in question concerning the tools taken from City Motor Parts, Inc., were voluntarily and understandingly made and are admissible as evidence in this case. *N*
>
> *O* (b) The statements made by the defendant on the occasion in question do not fall within the prohibition of *Miranda* v. *Arizona*. *P*"

The petitioner's objection was overruled and Agent Wise then testified before the jury to substantially the same facts which he related on voir dire.

The questions sought to be reviewed were raised during the Trial by timely objections and exceptions and carried forward and argued in both the Court of Appeals and the Supreme Court of North Carolina. See Assignments of Error Nos. 6 through 15, Record pages 72 through 78, inclusive.

REASONS FOR GRANTING THE WRIT

First, an analysis of the facts shows the following:

1. State Bureau of Investigation Agent, O. L. Wise, "had numerous conferences" with petitioner "between the days of June 12 and July 15", while petitioner was in jail.

2. Petitioner "didn't understand why his bond was as high as it was ($5,000.00); that he had a family and could not support his family by being in jail, and he could not employ counsel unless he could get out of jail and go to work; that he had a job in Virginia, and that if he could not get back to his job that his job would be terminated."

3. Petitioner asked Officer Wise "to contact the Judge and see if he could get his bond reduced so that he could make bond and go to work."

4. "He asked me to contact Judge Horner, and I attempted to contact Judge Horner and he was not in town; he was out of the County holding Court in the western part; I went back and told him (petitioner) this . . . we continued to talk."

5. Petitioner "constantly stated to me that he did not understand why his bond was so high, and kept insisting that I help him do something to get the bond lowered, and he indicated to me that he did not break in and enter into the building; that he purchased the tools."

6. Petitioner "sent for me and after I could not contact Judge Horner I went back to jail and advised him that I could not contact Judge Horner."

7. "I told him (petitioner) at that time that I was a police officer and naturally was interested in *any crimes* committed in the area or elswhere and *that anything of interest he could help me with I would appreciate it.*" (Emphasis added)

8. Petitioner "still wanted me to help assist in getting the bond lowered."

9. Officer Wise stated to petitioner "that if he gave me any information in solving any cases that I would let it be known."

10. Officer Wise "did not caution him (petitioner) of any of his constitutional rights."

11. Petitioner said he paid $90.00 for the stolen tools.

12. "On numerous occasions I (Officer Wise) told him (petitioner) if he had any information that would

assist me in *any investigation* I would appreciate it." (Emphasis added)

13. "On one occasion I believe he told me he purchased the tools in his yard."

14. "Each time he would send for me and I would go down and he wanted to know if I had found out anything and I would tell him exactly."

15. "My conversation and *questioning* with the petitioner was relative to obtaining information concerning these other crimes when I went to see him. (Emphasis added) It was during the course of these conversations that he related to me the fact that he had purchased the tools. It was during the course of these conversations that he related to me the fact that he had purchased the tools he had sold Mr. Hudson, from a third party, and that he had paid $90.00 for them."

16. "I have known Mr. Muse (petitioner) for several years."

The foregoing clearly shows that Officer Wise on numerous occasions visited petitioner in the jail; that petitioner was desperate to get his bond lowered; that Officer Wise assumed the role of an attorney and let the petitioner know that he, the officer, was seeking out the judge in order to render help; that Officer Wise was interested in any crimes committed in the area, *including the crime for which petitioner stood charged,* and that Officer Wise would appreciate it if the petitioner would supply him with information; that if petitioner gave Officer Wise any information in solving cases, including petitioner's case, that Officer Wise "would let it be known"; that Officer Wise did not caution petitioner of his constitutional

rights; that petitioner made a confession in this setting and under these circumstances; that the record in some ways reads like an attorney-client relationship between Officer Wise and the petitioner; that Officer Wise engaged in "*questioning*" the petitioner relative to other crimes; (Emphasis added) that during such "questioning" and expressions of gratitude on the part of Officer Wise if petitioner would give out any information, the petitioner gave out a confession; that petitioner and Officer Wise had known each other for several years, and the record reads as though they became close friends throughout a course of frequent visitation in the Pasquotank County jailhouse.

The prosecution may not use statements stemming from custodial interrogation of the petitioner unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination guaranteed by the Fifth Amendment of the Constitution of the United States. *Miranda* v. *Arizona,* 384 U.S. 436, 16 L.Ed. 2d 694, 86 S. Ct. 1602.

It is well settled that the Fourteenth Amendment to the Constitution of the United States prohibits the use of coerced confessions in State prosecutions, whether the coercion is physical *or mental. Haynes* v. *Washington,* 376 U.S. 503, 10 L.Ed. 2d 513; *Thomas* v. *Arizona,* 356 U.S. 390, 2 L.Ed. 2d 863, re-hearing denied 357 U.S. 944, 2 L.Ed. 2d 1557; *Payne* v. *Arkansas,* 356 U.S. 560, 2 L.Ed. 2d 975.

What is interrogation? It is asking questions. Officer Wise admitted that he asked questions about other crimes and while doing so got a confession from the petitioner with regard to the crime for which he stood charged. Officer Wise admitted that he stated

to the prisoner that he, Officer Wise, would appreciate it if the prisoner would give him any information in solving *any cases*. This is interrogation. The petitioner, Robert Muse, did not rush into the police station shouting to Officer Wise that he wished to confess a crime. Officer Wise, assuming the role of attorney, questions the prisoner about other offenses and tells him that if he will give him any information about any offense, including the offense charged, that he, Officer Wise, will appreciate it. This is a shrewd method of interrogation, and the prosecution should not be allowed to escape the constitutional issue decided in *Miranda* in any such fashion as appears on this record.

Suppose Officer Wise had said to the petitioner: Will you give me information that will help me in solving this case? This would be custodial interrogation, and it is believed that the State of North Carolina would concede that it is. Instead of asking the question or questions in this indicated form, Officer Wise said this to the petitioner on numerous occasions: If you have any information that would assist me in any investigation I would appreciate it. ("On numerous occasions I told him if he had any information that would assist me in any investigation I would appreciate it. . . . that I was a police officer and naturally was interested in any crimes committed in the area or elsewhere and that anything of interest he could help me with I would appreciate it . . . that if he gave me any information in solving any cases that I would let it be known." R., pp. 50 and 51) There is no difference between this method of inquiry or seeking out information than the clear cut grammatical question. Whether or not statements stem from custodial inter-

rogation certainly does not depend upon the grammar or semantics employed by the police officer. Otherwise, the procedural safeguards effective to secure the privilege against self-incrimination, enunciated in *Miranda,* would be effectively nullified. A question is a question from the standpoint of custodial interrogation even though the officer has shrewdly turned the question grammatically into an expression of gratitude if the prisoner will furnish him the information to solve the crime.

A confession is generally defined as "an acknowledgment in express words by the accused in a criminal case of the truth of the guilty fact charged or of some essential part of it." *State* v. *Hammer,* 240 N.C. 85, 81 S.E.2d 193 (1954), "It may be oral or written in whole or in part; and there is no requirement that an oral confession be reduced to writing . . ." *State* v. *Fox,* 277 N.C. 1 at 25 (1970). Any extra-judicial statement of an accused is a confession if it admits petitioner's guilt of an essential part of the offense charged. *State* v. *Hammer, supra.*

In the case at bar the petitioner was incarcerated in the Pasquotank County jail and on June 12, 1969 S.B.I. Officer O. L. Wise went to see him at the petitioner's request. The petitioner told him that he was in jail under a $5,000.00 bond; that he could not understand why his bond was so high and that he had a family which he could not support by being in jail and that HE COULD NOT EMPLOY COUNSEL unless he could get out of jail and go back to work. He said that he had a job in Virginia and that if he could not get back to his job that it would be terminated. The petitioner constantly requested of Officer Wise that he try to do something to get his bond lowered. There

were numerous conferences between Officer Wise and the petitioner between the dates of June 12 and July 15. (R. p. 50) Officer Wise at no time advised the petitioner of any of his constitutional rights but yet during these conferences with him extracted from him incriminating statements amounting to a confession of the particular crime which he was investigating.

Even though Officer Wise advised the petitioner that he could not make him any promises he told him that "if he gave me any information in solving any cases THAT I WOULD LET IT BE KNOWN." (R. pp. 50-51) The petitioner must have taken this expression to mean that if Mr. Wise let it be known that he was cooperating with the police in solving crimes in the area that maybe the court would be more lenient since Mr. Wise expressly said that he would "let it be known."

In *State* v. *Fuqua*, 269 N.C. 223, 152 S.E.2d 68 (1967), a police officer while questioning a defendant in jail, said to the defendant: "That if he wanted to talk to me then I would be able to testify that he talked to me and was cooperative." The court there said that this statement by a person in authority was a promise which gave the defendant a hope for lighter punishment and that such a statement was one from which the defendant gather some hope of benefit by confessing. The court also said, "The total circumstances surrounding the defendant's confession impels the conclusion that there was aroused in him an 'emotion of hope' so as to render the confession involuntary."

The petitioner in our case told the officer that he could not employ counsel unless he was able to go back to his job. He expressed concern for the support of his family and under all of these circumstances he was apparently under mental and emotional pressure and

distress and not knowing his rights to an attorney sent for Officer Wise to help him. Officer Wise testified that the petitioner constantly stated to him that he did not understand why his bond was so high and kept insisting to him that he (Officer Wise) help him do something to get the bond lowered (R. p. 50). Officer Wise should have advised the petitioner of his rights to a court appointed attorney when he knew the petitioner was repeatedly asking him to perform "attorney-like" functions.

The trial court in its voir dire findings failed to make findings with respect to counsel and as to whether or not the petitioner indicated a desire to confer with an attorney. For the reasons set out in the above paragraph it is apparent that the petitioner did not know of his rights to a court appointed attorney as he kept asking Officer Wise for help and to do for him functions which an attorney would ordinarily and normally do for his client.

In *Miranda* v. *Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L.Ed.2d 694 at 726 (1966), the court said with reference to an individual who had been taken into custody by law enforcement officers: "HE MUST BE WARNED PRIOR TO ANY QUESTIONING that he has the right to remain silent, that anything he says can be used against him in a court of law, etc. . . . Opportunity to exercise these rights must be afforded to him throughout the interrogation. AFTER SUCH WARNINGS HAVE BEEN GIVEN, AND SUCH OPPORTUNITY AFFORDED HIM, THE INDIVIDUAL MAY KNOWINGLY AND INTELLIGENTLY WAIVE THESE RIGHTS and agree to answer questions or make a statement. BUT UNLESS AND UNTIL SUCH WARNINGS AND WAIVER ARE DEMONSTRATED BY THE PROSECUTION AT TRIAL, no evidence obtained as a result

of interrogation can be used against him." (Emphasis added)

Even though Officer Wise testified that he did not "interrogate" the petitioner about the break-in nor did he "initiate" the discussions (R. p. 51) and that on each occasion of their talks the petitioner sent for him, he did carry on several and numerous conversations with the petitioner and at different times and on different days by which he obtained from the petitioner incriminating statements about the crimes he was investigating and of which the petitioner was accused of committing.

The record affirmatively discloses that prior to the making of these incriminating statements the petitioner was never advised of his rights to remain silent or that he had the right to a court appointed attorney.

> "The United States Supreme Court, in the recent case of Miranda v. Arizona, has held that, under the rule requiring warnings as to the right to counsel and the right to be silent, as a prerequisite to the admissibility of any statements made by an individual held for interrogation by a law enforcement officer, no distinction can be drawn between statements which are direct confessions and statements which amount to admissions of part or all of an offense, nor between inculpatory statements and statements alleged to be merely exculpatory. The constitutional right to remain silent, and to counsel, precludes the use of incriminating statements elicited by the police during in custody interrogation UNLESS THE RIGHT IS INTELLIGENTLY WAIVED, AND NO WAIVER CAN BE PRESUMED if the defendant is not informed of his right to remain silent and his right to counsel." 29 AM. JUR. 2d, EVIDENCE, Sec. 614 (Emphasis added)

The State no doubt will try to show that the petitioner's statements were voluntary because he waived his rights to remain silent. In 21 AM. JUR. 2d, CRIMINAL LAW, Sec. 219, at p. 259, it is expressed:

> "Where a constitutional right accorded the accused is treated was waivable, it may be waived by express consent, by failure to assert it in apt time, or by conduct inconsistent with a purpose to insist upon it. It must be remembered, however, that a waiver is ordinarily an intentional relinquishment or abandonment OF A KNOWN RIGHT OR PRIVILEGE. THERE CAN BE NO WAIVER WHERE THE DEFENDANT DOES NOT KNOW HIS RIGHTS. And such relinquishment or abandonment must also be voluntary. MOREOVER, THE UNITED STATES SUPREME COURT HAS HELD THAT EVERY REASONABLE PRESUMPTION WILL BE INDULGED AGAINST THE WAIVER OF FUNDAMENTAL CONSTITUTIONAL RIGHTS BY ONE CHARGED WITH CRIME." (Emphasis added)

"It is universally recognized that a confession of a person accused of crime may be admissible in evidence against the accused only if it was freely and voluntarily made, without duress, fear, or compulsion in its inducement AND WITH FULL KNOWLEDGE OF THE NATURE AND CONSEQUENCES OF THE CONFESSION. This rule applies to judicial, as well as to extrajudicial confessions." 29 AM. JUR. 2d, EVIDENCE, Sec. 529 at p. 580. (Emphasis added)

The petitioner in the case at bar even assuming that his statements were voluntary—which we contend were not—they were never made with any KNOWLEDGE OF THE CONSEQUENCES that they could or would be used against him in a court of law.

In *State* v. *Thorpe*, 274 N.C. 457, 164 S.E.2d 171 at 174 (1968), the court said, "If the accused is

without counsel, and is indigent, counsel must be provided by the authorities, or INTELLIGENTLY WAIVED." (Emphasis added)

It is strongly contended that at no time did the petitioner KNOWINGLY AND INTELLIGENTLY waive his right to counsel and to remain silent because he was never even AWARE of such rights. The burden should be heavier on the State when the petitioner makes incriminating statements especially when he was NEVER advised of his rights and this burden is justly on the State's shoulders as it establishes the isolated circumstances under which the petitioner engages into conversation with the police. There is nothing in the record to show that the petitioner did not want an attorney but in fact the contrary is impliedly shown when he said he could not afford one unless he could go back to his job. (See Findings of Fact No. 2, R. p. 54)

The case of *Carnley* v. *Cochran,* 369 U.S. 506, 82 S. Ct. 884, 8 L.Ed.2d 70 at 77 (1962), presented the rule of law that, "The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. ANYTHING LESS IS NOT A WAIVER." (Emphasis added)

In *U. S.* v. *Blalock*, 255 F. Supp. 268 (E.D. Pa. 1966), a federal district court said, ". . . rights given by the Constitution are too fundamental and too precious for waiver lightly to be found. (Cites omitted) It is only where there is 'an intentional relinquishment or abandonment of a known right or privilege', *Johnson* v. *Zerbst,* 304 U.S. 458, 464, 58 S. Ct. 1019, 1023, 82 L.Ed. 1461 (1938), that an effective

waiver can be found." In the *Blalock* case, three FBI agents encountered the defendant in a hotel lobby. The defendant, who was suspected of robbing a bank, was frisked by the agents after they identified themselves. Although they had no warrant, they accompanied the defendant to his room. When asked if he would consent to a search of his room, the defendant replied that he would not object. As a result of this consent search, money from the robbery was discovered and used as evidence at the defendant's trial but the evidence was later suppressed upon defendant's motion and a new trial granted. The facts of the *Blalock* case disclose that the agents failed to warn the defendant of his right to refuse a warrantless search and there was an absence of evidence that the defendant was aware of his right to do so under the Constitution. The court said that, "This constitutional right, like all others, may be waived by voluntary consent. In order to constitute a voluntary consent it must clearly appear that the search was voluntarily permitted or expressly invited and agreed to by the person whose right is involved." . . . "First, the consent must have been 'intelligent'. Obviously, the requirement of an 'intelligent' consent implies that the subject of the search must have been aware of his rights, FOR AN INTELLIGENT CONSENT CAN ONLY EMBRACE THE WAIVER OF A 'KNOWN RIGHT' ". "CERTAINLY ONE CANNOT INTELLIGENTLY SURRENDER THAT WHICH HE DOES NOT KNOW HE HAS." (Cites omitted) (Emphasis added) *U. S.* v. *Blalock, supra.* The Court there indicated that the requirement of knowledge serves the purpose to prevent the possibility "that the ignorant may surrender their rights more readily than the shrewd." *U. S.* v. *Blalock, supra.*

It is contended that the court should look particularly at the circumstances surrounding the petitioner in determining whether or not his admissions were induced through artifice or deception and whether improper inducements such as "hope" was involved. There is no doubt that the admissions were not induced by physical force or fear such as torture, violence or threats of the person. These elements were not present but through the cunning concern and efforts and the revisits of Officer Wise at the request of the petitioner there were implied inducements of hope made when he mentioned that "if he gave me any information in solving any cases that I would let it be known". (R. pp. 50-51) Was this improper influence leading the petitioner to believe that he would be helped? Was this a confession obtained by pretending to solicit from the petitioner information concerning the commission of other crimes?

There was an overbearing of the will of the petitioner in a subtle like manner when Officer Wise continued to act under the guise of friendship which is obviously displayed in the record by his returning at each request of the petitioner to talk about his bond or "other crimes in the area", while at the same time acting in the role of one of the chief investigating officers of the case. His presence in these recurrent visits must have caused the petitioner to lower his guard and defenses and confess everything to the officer. The petitioner's statements were nothing other than a product of mental compulsion resulting from faith placed upon a police officer masquerading as a "friend" for the officer had known the petitioner for several years. (R. p. 52) Officer Wise's conversation and questioning of the petitioner was under the

guise of obtaining information concerning other crimes. (R. p. 52)

The court in *Watts* v. *Indiana,* 338 U S. 49, 69 S.Ct. 1347, 93 L.Ed. 1801, 1805, said, "There is torture of mind as well as of body; the will is as much affected by fear as by force".

The case at bar is not too unlike *State* v. *Gibson,* 2 N.C. App. 187, 162 S.E.2d 627 (1968), where the officer said he advised the defendant (a minor) that ". . . if he knew anything about this, if he would tell me, I would in any way assist him or help him as a youngster". Or *State* v. *Woodruff,* 259 N.C. 333, 130 S.E.2d 641 (1963), where the sheriff told the defendant ". . . that if he would help us with this thing, we certainly would try to help him"; and *State* v. *Fuqua, supra,* where the officer testified, "Yes, sir. I told him if he wanted to talk to me then I would be able to testify that he talked to me and was cooperative". In these cases the court ruled that these statements constituted a type of promise which aroused in the defendant some ray of hope and were sufficient to render the confession involuntary. In our case Officer Wise testified that "I told him at that time that I was a police officer and naturally was interested in any crimes committed in the area or elsewhere and that anything of interest he would supply me with that I would appreciate it". (R. p. 50) He also made the following statement (repeated here again for convenience of reader and emphasis): ('that if he gave me any information in solving any cases that I would let be known". These statements by Officer Wise aroused in the petitioner some ("hope" and this "emotion of hope" helped to induce the conferences and conversations and questioning which led to the petitioner's con-

fessions because the circumstances surrounding in-custody conversations and questioning can do doubt operate very quickly to overbear the will of a prisoner who has never been made aware of his rights because of the inherent coerciveness or intimidating atmosphere of confinement. The influence of the confinement of a jail should be a strong circumstance for the court to consider in determining whether or not the statements in question were voluntary and duly waived. The officer's role during these periods cannot be considered passive even though the petitioner called for him since the officer's efforts were focused upon solving the crime alleged to have been committed and the question of whether or not a confession is voluntary or involuntary should be determined upon these circumstances.

The court in *State* v. *Bishop,* 272 N.C. 283, 158 S.E.2d 511 at 517 (1968), stated "It is with pardonable pride that we note that for over one hundred forty years the rule enumerated in *State* v. *Roberts* (12 N.C. 259), *supra*, that 'a confession obtained by the SLIGHTEST EMOTIONS OF HOPE or fear ought to be rejected' has been an approved and applied rule of this court." (Emphasis added)

The petitioner here was not in familiar surroundings such as his home. He was isolated from friends and family. There was no attorney looking after his best interest and he was greatly concerned about the high bond placed upon him.

It is not contended that questioning of the petitioner while he is in custody by the police is prohibited either as a matter of law or due process WHEN he has been advised of the rights laid down in *Miranda* because the petitioner may waive effectuation of these rights

when he does so knowingly and intelligently. The lower court's conclusions of law as to the voluntariness of the confession are not supported by the facts as there is no evidence in the record which shows that the petitioner UNDERSTANDINGLY waived his rights. The petitioner could not have made his statements understandingly when he was never advised of his rights. In *United States* v. *Hucinich,* 404 F.2d 262 at 266 (1968), the court said that, "The gist of Miranda is that any statement of an accused while in custody is ipso facto involuntary unless he has been properly warned."

It is further contended that the lower court erred in failing to make findings of fact as to whether or not the right to counsel was intelligently and understandingly waived since the petitioner told Officer Wise that he could not employ counsel unless he could get out and attend to his job. The lower court failed to conclude as a matter of law that this right was knowingly, intelligently and understandably waived.

For the reason that the state never demonstrated that the petitioner knowingly and intelligently waived his privilege against self-incrimination since he was never advised of his rights, it is respectfully requested that a new trial be granted: See *State* v. *Mills,* 6 N.C. App. 347 at 353 (1969), where the court said, ". . . the state had to demonstrate compliance with two requirements before the confession, resulting from this in-custody interrogation, could be properly admitted into evidence. The first was that the defendant knowingly and intelligently waived his privilege against self-incrimination. The second was that this was done after the defendant had knowingly and intelligently waived his right to retained or appointed counsel."

The holding of the Supreme Court of North Carolina in petitioner's case does not seem consistent with its holding in *State* v. *Blackmon,* 280 N.C. 42, filed the same day, where the Supreme Court of North Carolina quoted from *Miranda* as follows:

> " 'The circumstances surrounding in-custody interrogation can operate very quickly to overbear the will of one merely made aware of his privilege by his interrogators. Therefore, the right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege under the system we delineate today. Our aim is to assure that the individual's right to choose between silence and speech remains unfettered throughout the interrogation process. A once-stated warning, delivered by those who will conduct the interrogation, cannot itself suffice to that end among those who must require knowledge of their rights. A mere warning given by the interrogators is not alone sufficient to accomplish that end . . .
>
> " 'An individual need not make a pre-interrogation request for a lawyer. While such request affirmatively secures his right to have one, his failure to ask for a lawyer does not constitute a waiver. No effective waiver of the right to counsel during interrogation can be recognized unless specifically made after the warnings we here delineate have been given . . .
>
> " 'An express statement that the individual is willing to make a statement and does not want an attorney followed closely by a statement could constitute a waiver. But a valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained . . .

> "'After such warnings have been given, and such opportunity accorded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement. But unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him.'"

The United States Supreme Court in *Chapman* v. *California*, 386 U.S. 18, 17 L.Ed. 2d 705, 87 S.Ct. 824 (1967), said:

> ". . . (B)efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt".

Admission, over objection, of evidence obtained in violation of a right guaranteed the defendant by the Constitution of the United States can be harmless error, if, but only if, the court can declare there is no reasonable possibility that such evidence contributed to the conviction. *Chapman* v. *California, supra; Fahy* v. *Connecticut*, 375 U.S. 85, 84 S.Ct. 229, 11 L.Ed. 2d 171.

It is clear that the evidence objected to in petitioner's case contributed to his conviction and thus cannot be harmless error.

Copy of Order marked Exhibit 3 appended hereto appointing the undersigned as counsel for indigent Petitioner.

CONCLUSION

For the reasons set forth above it is respectfully submitted that this Petition for Writ of Certiorari should be granted.

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(Area Code 919)
Counsel for Petitioner

APPENDIX

EXHIBIT 1

Judgment

COURT OF APPEALS OF NORTH CAROLINA

Spring Session, 1971

No. 7118C94 Camden County

STATE OF NORTH CAROLINA

v.

ROBERT MUSE

This cause came on to be argued upon the transcript of the record from the Camden County Superior Court. Upon consideration whereof, this Court is of opinion that there is error in the record and proceedings of said trial tribunal.

It is therefore considered and adjudged by the Court here that the opinion of the Court, as delivered by the Honorable Earl W. Vaughn, Judge, be certified to the said trial tribunal to the intent that a new trial is awarded. And it is considered and adjudged further, that the said Camden County Board of Commissioners do pay the costs of the appeal in this Court incurred, to wit, the sum of Five and 50/100 dollars ($5.50), and execution issue therefor. Certified to Superior Court this 7th day of June 1971.

A true copy.

/s/ THEODORE C. BROWN, JR.
Clerk of the Court
of Appeals

[Filed May 26, 1971]

No. 711SC94 FIRST DISTRICT

NORTH CAROLINA COURT OF APPEALS

SPRING SESSION 1971

From Camden

STATE OF NORTH CAROLINA

v.

ROBERT MUSE

Appeal by defendant from Rouse, J., 22 September 1970 Session of Superior Court held in Camden County.

The defendant was charged in a bill of indictment with breaking and entering a building occupied by City Motor Parts, Inc. of Elizabeth City, with larceny of personal property located therein, and with receiving stolen goods, knowing them to be stolen. The bill of indictment was returned in Pasquotank County, on motion of the defendant for a change of venue, the case was transferred to the Superior Court of Camden County for trial. The defendant was tried only upon the charge of receiving stolen goods. He pleaded not guilty. From a verdict of guilty, defendant appeals.

Attorney General Robert Morgan by Assistant Attorney General William F. Briley for the State.

Worth and Beaman by Grafton G. Beaman for defendant appellant.

VAUGHN, Judge. Appellant contends that the court erred in its findings entered after *voir dire* as to whether his confession was voluntary, and in allowing into evidence incriminating statements amounting to a confession. The evidence shows that S.B.I. Officer O. L. Wise stated that he visited the defendant in his jail cell and had a conversation

with him. At that point, counsel for defendant entered an objection, and a *voir dire* was conducted. Officer Wise's testimony on *voir dire* is, in substance, as follows: Officer Wise made several visits to defendant's jail cell between 12 June 1969 and 15 July 1969. Each visit to the defendant's cell was a result of defendant's request to see him. The defendant stated on several of these visits that he did not understand why his bond was so high; that he had a family and could not support his family by being in jail, and he could not employ counsel unless he could get out of jail and go to work. He asked the officer to help him do something to get his bond lowered. The officer tried to contact a judge but was unable to do so and so advised the defendant. The defendant indicated he might have some information that would be of interest and value to the officer. The officer told the defendant that if he could help the officer in solving any crimes he would appreciate it. "He still wanted me to help assist in getting the bond lowered." The officer told the defendant that he was a police officer and could not make any promises. The officer did, however, tell the defendant that if he gave him any information in solving any case that "I would let it be known." Officer Wise said that he did not caution defendant of his constitutional rights because he did not go to the jail to interrogate defendant, but went there at defendant's request. Officer Wise said all of defendant's statements were voluntarily made, without any prompting from him. The defendant did not offer any evidence on *voir dire*. Judge Rouse found facts in substance as follows: At no time were the discussions with the defendant initiated by Officer Wise. Mr. Wise did not request the defendant to make a statement with respect to the alleged breaking and entering of City Motor Parts, Inc. and larceny of tools therefrom. The information and statements of the defendant were volunteered. This was not a custodial interrogation wherein the questioning was initiated by a law enforcement officer. There is nothing to indicate any lack

of intelligence of the defendant. Judge Rouse concluded that the statements were voluntarily and understandingly made, and admissible as evidence in this case. The jury returned and the officer related the statements made to him by defendant with reference to the tools.

This court must decide as a matter of law whether the circumstances of this case rendered the confession inadmissible. State v. Fuqua, 269 N.C. 223, 152 S.E. 2d 68. In doing so, we will again bring forward the following from State v. Roberts, 12 N.C. 259:

> "Confessions are either voluntary or involuntary. They are called voluntary when made neither under the influence of hope or fear, but are attributable to that love of truth which predominates in the breast of every man, not operated upon by other motives more powerful with him, and which, it is said, in the perfectly good man cannot be countervailed. These confessions are the highest evidences of truth, even in cases affecting life. But it is said, and said with truth, that confessions induced by hope or extorted by fear are, of all kinds of evidence, the least to be relied on, and are therefore entirely to be rejected."

The defendant was in custody and without counsel. He had reason to believe that the officer would act as an intercessor with the court in an effort to get his bond reduced. In fact the officer did attempt to contact a judge and the defendant was so advised. The defendant told the officer he had information that would be of value and was told that such information would be appreciated. Although the officer told the defendant that he knew he could not make any promise, he also told him, "If he gave me any information in solving any cases that I would *let it be known.*" "[A] confession obtained by the slightest emotions of hope or fear ought to be rejected." State v. Roberts, *supra*. The total circumstances surrounding the

defendant's statement to the officer compel us to hold as a matter of law that it was prompted by an "emotion of hope" and thus was involuntary. State v. Fuqua, *supra*, State v. Woodruff, 219 N.C. 333, 130 S.E. 2d 641; State v. Gibson, 2 N.C. App. 187, 162 S.E. 2d 627. Its admission in evidence was error. Since there must be a new trial, we do not discuss the other assignments of error brought forward by the defendant.

New Trial.

CHIEF JUDGE MALLARD and JUDGE PARKER concur.

A True Copy

THEODORE C. BROWN, JR.
Clerk of the Court of Appeals
of North Carolina

By: PATTIE P. BARBER
Deputy Clerk

June 7, 1971

EXHIBIT 2

Judgment

SUPREME COURT OF NORTH CAROLINA

Fall Term, 1971

No. 88 Camden County

(711SC94)

STATE OF NORTH CAROLINA

v.

ROBERT MUSE

This cause came on to be argued upon the transcript of the record from the North Carolina Court of Appeals: Upon consideration whereof, this Court is of opinion that

there is error in the record and proceedings of said Court of Appeals,

It is therefore considered and adjudged by the Court here that the opinion of the Court, as delivered by the Honorable Joseph Branch, Justice, be certified to the said North Carolina Court of Appeals, to the intent that the judgment is reversed. And it is considered and adjudged further that the defendant do pay the costs of the appeal in this Court incurred, to wit, the sum of ***Fifty-Seven and 00/100*** dollars ($57.00), and execution issue therefor. Certified to North Carolina Court of Appeals this 27th day of December 1971.

A True Copy.

ADRIAN J. NEWTON
Clerk of the Supreme Court
By: MRS. PEGGY N. BYRD,
Deputy Clerk

SUPREME COURT OF NORTH CAROLINA

FALL TERM 1971

No. 88—Camden

STATE OF NORTH CAROLINA

v.

ROBERT MUSE

On certiorari to review decision of the Court of Appeals reported in 11 NC App. 389, which ordered a new trial for error found in the trial before Rouse, J., at 22 September 1970 Session of Superior Court of Camden.

We allowed the State's petition for certiorari pursuant to G.S. 7A-31 on 30 July 1971.

Defendant was charged in a bill of indictment by the Grand Jury of Pasquotank County with breaking and entering and larceny, and with receiving stolen goods, knowing them to be stolen. On 25 February 1970 defendant appeared in the Superior Court of Pasquotank County with counsel J. Ball of the Virginia Bar, and Mr. J. W. Jennette of the Pasquotank Bar. His counsel tendered a plea of guilty to receiving stolen property; however, defendant stated that he would plead guilty to receiving stolen property, but not knowing that it was stolen. The court refused to accept this plea, and set the trial for the next day. Defendant failed to appear, and the trial judge set his appearance bond in the amount of $20,000. Defendant was later apprehended in Virginia and was returned to Pasquotank County jail. He escaped from that jail and was again apprehended, and upon return to North Carolina was sent to Central Prison in Raleigh to await his trial. Upon defendant's motion, Judge Walter Cohoon ordered a change of venue to Camden County, set defendant's appearance bond in the amount of $10,000, and set the date of trial for the 21 September 1970 Session of Camden. The case was called for trial on 22 September 1970, and the solicitor announced that he elected to try defendant on the charge of receiving stolen property. Defendant, through his counsel, Messrs. J. M. Ball and Herbert Mullen, entered a plea of not guilty.

The State's evidence may be summarized as follows:

Thomas L. McDaniels, part-owner of City Motor Parts, Inc., testified that on the morning of 3 May 1969 he discovered that his building had been forcibly entered during the previous night and that a number of tools and automobile parts had been removed. At the request of the police he had hastily prepared a list of missing tools which he valued at approximately $1,000 to $1,200. He later identified a number of missing tool sets by descriptions and stock number. These tool sets had not appeared on the

original list. He stated, over objection, that in his opinion these tool sets had a fair market value of $200 to $250.

Calvin Hudson, who operated an automobile repair garage in Pasquotank County, testified that sometime after 3 May 1969 defendant offered to sell him a box of tools for $130. Defendant stated that the tools were not stolen. Hudson told defendant that he did not have that kind of money and would need two or three days to get the money. On the next day he contacted Thomas McDaniels, who told him to go ahead and buy the tools. He bought the tools. He bought the tools two or three days later for the agreed price of $130, notified McDaniels, and later delivered the tools to McDaniels and the local police officers. He did not get any serial numbers from the tools, but he stated that a number of the tools exhibited to him in court were similar to those which he had delivered to McDaniels and the police officers.

W. C. Owens, Chief of Police of Elizabeth City, stated that he accompanied McDaniels and SBI Agent O. L. Wise to Hudson's garage where Hudson exhibited and delivered a number of tools to them. Owen identified a number of the tools as being a portion of the tools seen at the garage. He identified a paperwriting made by him on 22 May 1969 which purported to be a list of items recovered from Hudson's gagage which Hudson had purchased from Robert Muse on Wednesday, 21 May 1969. The first item on this list was an "Ingersol Rand Impactool, size 405, Serial No. 128125, Model A." The list which he identified was marked State's Exhibit 15, and was introduced into evidence over defendant's objections.

T. L. McDaniels was recalled and identified and placed values totalling $685 on tools which he said were the same as described on the itemized lists. He could identify only the air wrench by serial number. Other items were identified by inventory and stock number. He stated his business

was the only one in the Elizabeth City area which sold some of the items recovered from Hudson.

SBI Agent O. L. Wise, *inter alia*, testified as to conversations he had with defendant while defendant was confined in jail. This witness' testimony will be considered in the opinion.

The State's other evidence was cumulative and need not be recounted.

The defendant offered no evidence.

The jury returned a verdict of guilty of receiving stolen goods, knowing them to be stolen, as charged in the bill of indictment. Defendant appealed from judgment imposing a prison sentence for a term of not less than five nor more than seven years.

ATTORNEY GENERAL MORGAN, ASSISTANT ATTORNEY GENERAL BRILEY for the State.

GRAFTON G. BEAMAN, WORTH & BEAMAN, for Defendant.

BRANCH, Justice. Defendant's principal assignment of error is that the trial court erred in its *voir dire* findings and in allowing into evidence incriminating statements made by defendant.

When the State called SBI Agent O. L. Wise as a witness, he testified that he had had a conversation with defendant. Upon objection, the trial judge excused the jury and held a *voir dire* hearing.

Agent Wise testified on *voir dire* that he made several visits to defendant's jail cell during the period from 12 june 1969 to 15 July 1969. Each visit was made pursuant to a request by defendant. Defendant asked his help towards getting a smaller apeparance bond. Defendant told him that he had information that would be helpful in solving other crimes. Wise told defendant that if he gave him any information he would appreciate it and that he "would

let it be known." He told defendant that he could make no promises. He never cautioned defendant as to his constitutional rights since he did not go to the jail for the purpose of questioning defendant. Wise stated that all statements made by defendant were made without prompting from him and that he did not initiate any of the questions or at any time interrogate defendant. Defendant gave his information concerning other crimes and also told him that he (defendant) had bought certain tools for $90 which he later sold to Mr. Hudson. Defendant further stated that he did not break into the City Motor Parts building. Wise was the only witness to testify on *voir dire* and he was not cross-examined by defendant's attorney.

At the close of the *voir dire* hearing, the trial judge, *inter alia*, found:

> (7) No "Miranda warning" was given to the defendant by Mr. Wise. At the time of the alleged conversation the defendant was under arrest and was in custody. *C* Mr. Wise did not request the defendant to make a statement concerning the alleged breaking and entering of City Motor Parts, Inc., and larceny of tools therefrom. The information and above statements of the defendant were volunteered on the occasions when he called for Mr. Wise and when Mr. Wise talked to him at his request in the Pasquotank County Jail. *D*
>
> *E* (8) Mr. Wise did not solicit information from the defendant concerning the City Motor Parts, Inc. case. *F*
>
> *G* (9) This was not a custodial interrogation, wherein the questioning was initiated by a law enforcement officer after the person had been taken into custody, or otherwise deprived of his freedom of action. *H*

The Court then concluded:

> *M* (a) The statements made by the defendant on the occasions in question concerning the tools taken from

City Motor Parts, Inc., were voluntarily and understandingly made and are admissible as evidence in this case. *N*

O (b) The statements made by the defendant on the occasion in question do not fall within the prohibition of Miranda v. Arizona. *P*

Defendant's objections was overruled and Agent Wise then testified before the jury to substantially the same facts which he related on *voir dire*.

There was plenary evidence to support the findings of fact made by the trial judge, and such findings will not be disturbed on appeal. State v. Childs, 269 NC 307, 152 SE 2d 453; State v. Bruce, 268 NC 174, NC 150 SE 2d 216.

We therefore need only decide whether the circumstances of this case, as a matter of law, rendered the statements inadmissible.

The statements made by defendant to SBI Agent Wise were inculpatory since they admitted an essential part of the offense charged. State v. Hamer, 240 NC 85, 81 SE 2d 193. However, the fact that defendant was in custody when he made the statements does not of itself render the confession inadmissible. State v. Hines, 266 NC 1, 145 SE 2d 363.

In Miranda v. Arizona, 384 US 436, 16 L. ed. 2d 694, 86 S. Ct. 1602, we find the following:

> "(T)he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into

custody or otherwise deprived of his freedom of action in any significant way.

. . . .

"The fundamental import of the privilege while an individual is in custody is not whether he is allowed to talk to the police without the benefit of warnings and counsel, but *whether he can be interrogated*. There is no requirement that police stop a person who enters a police station and states that the wishes to confess to a crime, or a person who calls the police to offer a confession or any other statement he desires to make. Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding to-day." Id. at 478, 16 L. ed. 2d at 726, 86 S. Ct. at 1630. (Emphasis added)

Accord: State v. Chance, filed this day; State v. Fletcher and St. Arnold, 279 NC 85, 181 SE 2d 405; State v. Morris, 275 NC 50, 165 SE 2d 245; State v. Perry, 276 NC 339, 172 SE 2d 541; State v. Meadows, 272 NC 327, 158 SE 2d 638; State v. Spence, 271 NC 23, 155 SE 2d 802.

It should be noted that the statement made by the SBI Agent that he would "let it be known" was made in conversation concerning other crimes and was accompanied by a statement from the officer that he could make no promises.

The circumstances of this case do not show that defendant's statements were "obtained by hope or fear," State v. Roberts, 42 NC 259, or that they resulted from any sort of pressure, State v. Perry, supra. This record clearly shows that there was no custodial interrogation. Thus, it was not necessary for Agent Wise to warn defendant of his rights as required by Miranda v. Arizona, supra.

There was no error in the *voir dire* proceedings, and the trial judge properly admitted defendant's statements into evidence.

When this Court grants certiorari pursuant to 7A-31, our review is ordinafily restricted to the rulings of the Court of Appeals which are assigned as error in the petition for certiorari and brought forward in petitioner's brief. State v. Williams, 274 NC 328, 163 SE 2d 353. However, this case is unusual in that it is a criminal case in which the State petitioned for certiorari. The Court of Appeals ruled on only one of defendant's assignments of error in granting a new trial. We therefore elect to depart from the general rule and consider the remaining assignments of error.

Defendant contends that the trial judge committed prejudicial error by allowing certain opinion evidence as to value. During the solicitor's direct examination of State's witness Thomas L. McDaniels, the part-owner and operator of City Motor Parts, Inc., the following occurred:

> Q. Did you place a value on these items that were missing? A. No, sir.
>
> Q. Do you have an opinion now satisfactory to yourself as to the reasonable market value of them? A. Well—
>
> OBJECTION by defendant OVERRULED. EXCEPTION No. 1.
>
> A. Well I would estimate between Two and Two Fifty.
>
> Q. $200 and $250? A. Yes, sir.

A witness who has knowledge of value gained from experience, information and observation, may give his opinion of the value of personal property. Stansbury, N. C. Evidence 2d, § 128, p. 300.

In this jurisdiction when a witness is offered for the purpose of giving opinion evidence, the approved procedure requires that he first be qualified to give the evidence. After qualification, he is asked if he has an opinion and, upon giving an affirmative answer, is then asked to state his opinion.

The witness McDaniels obviously had such experience and knowledge as would qualify him to give opinion evidence concerning the value of this property. Since his answer clearly indicated that he had an opinion, his failure to first state that he had such opinion does not constitute prejudicial error.

Even had the admission of this evidence been prejudicial error, it was later rendered harmless by the admission, without objection, of similar evidence from the same witness. Carver v. Lykes, 262 NC 345, 137 SE 2d 139. This assignment of error is overruled.

Defendant contends that the trial judge's failure to instruct the jury that they must find from the evidence and beyond a reasonable doubt that the tools allegedly received by defendant were the same tools stolen from City Motor Parts, Inc., resulted in prejudicial error.

In support of this contention he cites and relies on State v. Frazier, 9 NC App. 44, 175 SE 2d 377, and State v. Jackson, 4 NC App. 459, 167 SE 2d 20, which require such a charge. In these cases the defendants were charged with breaking and entering and larceny, and the State relied on the doctrine of recent possession of stolen goods.

The doctrine of recent possession of stolen goods as recognized by this Court allows the raising of an inference that the possessor is guilty of breaking and entering and larceny. It is an evidentiary circumstance to be considered by the jury along with all other circumstances. State v. Allison, 265 NC 512, 144 SE 2d 578; State v. Foster, 268 NC 480, 151 SE 2d 62. The trial judge in such cases must require the jury to find from the evidence and beyond a reasonable doubt that the goods found in possession of the accused are the same goods that were lost as the result of the breaking and entering or the larceny with which he stands charged. State v. Jackson, 274 N.C. 594, 164 SE 2d 369. This requirement is understandable since the allowed inference would lose all its probative value if the goods

possessed by the defendant were not the same goods lost as a result of the larceny or the breaking and entering with which he stood charged.

The essential elements of the crime of receiving stolen goods are: "(a) The stealing of the goods by some other than the accused; (b) that the accused, knowing them to be stolen, received or aided in concealing the goods; and (c) continued such possession or concealment with a dishonest purpose." State v. Neill, 244 NC 252, 93 SE 2d 155. Wharton's Criminal Evidence, 10th Edition, Volume 1, § 325b, p. 643.

The crime of receiving stolen goods is a "sort of secondary crime based upon a prior commission of the primary crime of larceny" and "(t)he inference or presumption arising from the recent possession of stolen property, without more, does not extend to the statutory charge (G.S. 14-71) of receiving stolen property knowing it to have been stolen or taken." State v. Neill, supra.

In his final mandate to the jury, the trial judge charged.

> So I charge you, Ladies and Gentlemen, that if you find from the evidence and beyond a reasonable doubt, the burden being on the State to so satisfy you, that the defendant, Robert Muse, at the time and place in question, that is, subsequent to May 3, 1969 and before May 21, 1969, did receive certain goods, which had been stolen by some person other than the defendant, and that the goods so stolen and so received by the defendant, were of a value in excess of $200, and that at the time he received the goods the defendant knew that they had been theretofore feloniously stolen, and that the property was received by the defendant with a felonious intent, that is, the intent to deprive the owner of its property permanently and to convert it to the use of the person so receiving the same, that is, the defendant, it will be your duty to render a verdict against the defendant of guilty, as charged in the bill.

of indictment. If you fail to so find it will be your duty to give a verdict of not guilty, or if upon a fair and impartial consideration of all the evidence and circumstances in the case you have a reasonable doubt as to his guilt, it will be your duty to give him the benefit of such doubt and acquit him.

If under the circumstances of this case you find from the evidence and beyond a reasonable doubt that the defendant received stolen goods, knowing them to be stolen, as the court has explained these terms to you, and the goods in question were of a value of $200 or less, then it would be your duty to return a verdict of guilty of receiving stolen goods, knowing them to have been stolen, of a value of $200.00 or less, a misdemeanor. If you fail to so find it will be your duty to give a verdict of not guilty, or if upon a fair and impartial consideration of all the evidence and circumstances in the case you have a reasonable doubt as to his guilt, it will be your duty to give him the benefit of such doubt and acquit him.

In instant case the State does not rely on inferences or presumptions, and the charge placed upon the State the burden of proving beyond a reasonable doubt each individual element of the crime of receiving stolen property. This charge was adequate and this assignment of error is overruled.

Defendant contends that the trial judge committed prejudicial error by admitting into evidence State's Exhibits 8, 9, 10, 11 and 15 without sufficient identification by the State's witnesses.

State's Exhibit 15 was an inventory or list made by Chief of Police Owens of tools that he received from the witness Hudson. He testified that he made the inventory immediately after the tools were received from Hudson.

State's Exhibit 10, consisting of nineteen Husky socket wrenches; State's Exhibit 11, consisting of a ratchet wrench

and extension; and State's Exhibit 9, a box of tools, were all admitted into evidence after witness Hudson stated that they appeared to be the same items that he had purchased from defendant and after the Chief of Police had, without objection, identified State's Exhibits 8, 9, 10, and 11 as the items he had received from Hudson. State's Exhibit 8 was identified by Cliff Jones, a part-owner of City Motor Parts, Inc., by the number and his handwriting that appeared thereon.

Any object which has a relevant connection with the case is admissible into evidence. State v. Stroud, 254 NC 765, 119 SE 2d 907. Such object must be identified by the witness. State v. Burno, 158 NC 632, 74 SE 462.

In the case of State v. Macklin, 210 NC 496, 187 SE 785, the defendant was charged with murder. It was there stated:

> "The only other exception was to the admission of the shotgun as an exhibit in the case. It was competent to show the possession of a shotgun by defendant about the time of the homicide, and it was testified that the one found in his room was like the one with which he had been seen on the night the deceased was shot. This exception cannot be sustained. S. v. Burno, 158 N.C., 632; S. v. Vann, 162 N.C., 534. The charge of the court was free from error."

See also: State v. Fikes, 270 NC 780, 155 SE 2d 277; State v. Jarrett, 271 NC 576, 157 SE 2d 4; State v. Tilley, 272 NC 408, 158 SE 2d 573.

We hold that State's Exhibits 8, 9, 10, 11 and 15 were relevant and were sufficiently identified before their introduction. The trial judge properly admitted them into evidence.

A careful examination of the entire record fails to reveal prejudicial error. The decision of the Court of Appeals is

Reversed.

EXHIBIT 3

GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

NORTH CAROLINA
CAMDEN COUNTY

STATE OF NORTH CAROLINA

v.

ROBERT MUSE, *Defendant*

Order

This cause coming on for consideration as a result of a Petition filed in the Superior Court of Camden County on the 17th day of January, 1972, seeking the appointment of counsel to have reviewed in the Supreme Court of the United States the decision of the Supreme Court of North Carolina in the above-entitled matter, and to also have an appearance bond set pending said review, the undersigned finds that the defendant was convicted in Camden County of unlawfully receiving stolen property, knowing it to have been stolen, and was represented by court-appointed counsel, Mr. Herbert Mullen; that thereafter an appeal from the conviction of the defendant was taken and Mr. Grafton Beaman was appointed by the Court to perfect the appeal, which he did; that the Court of Appeals granted a new trial for errors assigned, and thereafter the State of North Carolina for review of said decision, which was granted, and subsequent review by the Supreme Court of North Carolina resulted in reversing the North Carolina Court of Appeals and affirming the Superior Court trial. Attorney Beaman represented the defendant before the Court of Appeals, and the Supreme Court of North Carolina. That upon the certification of the opinion of the Supreme Court of North Carolina commitment was issued, and the defendant taken into custody, and is now imprisoned, and being held under direction of the North Carolina Department of Correction.

The Court finds that the said defendant Petitioner is an indigent and is entitled to the appointment of counsel for the review petitioned for, pursuant to the provisions of G. S. 7A-451(b)(6), and that it is necessary to appoint an attorney to represent him with respect to said review. That Mr. Grafton Beaman, as a result of appointment to an official position in the Federal Courts of the United States, is not allowed to practice in the Federal Courts of the United States, and appointment of the Petitioner's previous appellate counsel would be inappropriate. The undersigned finds that Mr. Gerald F. White, of Elizabeth City, is an able and competent attorney, and has practiced before the Supreme Court of the United States;

IT IS THEREFORE ORDERED AND DIRECTED that Mr. Gerald F. White be, and he is hereby, appointed as counsel to represent the said defendant Petitioner, to affect a review of the decision of the Supreme Court of North Carolina by the Supreme Court of the United States.

That as to the portion of the Petition requesting that appearance bond be set pending said review, the undersigned is of the opinion that he has no authority to set such bond, and that as to any relief in this respect the Petitioner will have to seek the same from the Chief Justice of the Supreme Court of North Carolina, or through the Federal Court.

The Court finds that the defendant is presently being confined at Central Prison, 835 West Morgan Street, Raleigh, North Carolina, under a commitment for his imprisonment to serve the sentence imposed in the Superior Court of Camden County, which commitment issued following certification of the opinion of the Supreme Court, and certification from the Court of Appeals.

For the reason hereinabove stated, the undersigned declines to set any bond as requested.

IT IS DIRECTED that the Clerk of the Superior Court of Camden County furnish copies of this Order to the defend-

ant, Robert Muse, at his present place of confinement; and a copy to his court-appointed attorney, Mr. Gerald F. White, of Elizabeth City, N. C.; a copy to Solicitor Herbert Small; and that a copy of the same be filed with the Clerk of the Supreme Court of North Carolina.

This 22nd day of January, 1972.

/s/ WALTER W. COHOON
Walter W. Cohoon
Resident Judge, First Judicial District of North Carolina.

INDEX

Opinion Below 1

Jurisdiction 2

Questions 2

Constitutional Provisions Involved 2

Statement of Case 3

Statement of Facts 3

Argument 8

Conclusion 15

TABLE OF CASES

CARNLEY v. COCHRAN, 369 U. S. 506 (1962) 13

COLEMAN v. ALABAMA, 399 U. S. 1 (1970) 12

KONVALIN v. SIGLER, 431 F. 2d 1156 (8th Cir. 1970) 12

MIRANDA v. ARIZONA, 384 U. S. 436 (1966) 11, 13, 15

PHILLIPS v. STATE OF NORTH CAROLINA, 433 F. 2d 659 (4th Cir. 1970) 12

STATE v. FUQUA, 269 N. C. 223, 152 S. E. 2d 68 (1966) 9

STATE v. GIBSON, 2 N. C. App. 187, 162 S. E. 2d 627 (1968) 9

STATE v. GRIER, 203 N. C. 586, 166 S. E. 595 (1932) 10

STATE v. HUDSON, 218 N. C. 219,
10 S. E. 2d 730 (1940) .....

STATE v. ROBERTS, 12 N. C. 259 (1827) .....

STATE v. THORPE, 274 N. C. 457,
164 S. E. 2d 171 (1968) .....

STATE v. WOODRUFF, 259 N. C. 333,
130 S. E. 2d 641 (1963) .....

UNITED STATES v. BLALOCK, 255 F. Supp. 268
(E. D. Pa. 1966) .....

UNITED STATES EX REL BONNER v. PATE,
430 F. 2d 639 (7th Cir. 1970) .....

STATUTES INVOLVED

N. C. G. S. 7A-451 .....

28 U. S. C. §1257(3) .....

MISCELLANEOUS

29 Am. Jur. 2d, Evidence, §529 at P. 580 .....

SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. 71-1111

ROBERT MUSE,

Petitioner,

v.

STATE OF NORTH CAROLINA,

Respondent.

BRIEF OF RESPONDENT, STATE OF NORTH CAROLINA, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

From a verdict of guilty of receiving stolen goods, and judgment of imprisonment entered by the Superior Court on 23rd day of September, 1970, defendant appealed to the North Carolina Court of Appeals. The opinion of the North Carolina Court of Appeals (Intermediate Appellate Court) awarding petitioner a new trial is reported at 11 N. C. App. 389, 181 S. E. 2d 207. The State's petition for Writ of Certiorari to the North Carolina Court of Appeals was allowed by the Supreme Court of North Carolina. The opinion of the Supreme Court of North Carolina, reversing the North Carolina Court of Appeals and affirming the conviction of the trial court, is reported at 280 N. C. 31, 185 S. E. 2d 214.

JURISDICTION

The jurisdiction of this Court has been invoked pursuant to 28 U. S. C. §1257(3).

QUESTIONS

I

DID THE TRIAL COURT ERR IN ITS *VOIR DIRE* FINDINGS AND IN ALLOWING INTO EVIDENCE INCRIMINATING STATEMENTS AMOUNTING TO A CONFESSION OF THE PETITIONER WHEN HE WAS NEVER ADVISED OF HIS CONSTITUTIONAL RIGHTS?

II

DID THE CONFESSION OF THE PETITIONER EMANATE FROM MENTAL COERCION IN THE FORM OF HOPE OF REWARD?

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT V

"No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

AMENDMENT XIV

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state

wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF CASE

The petitioner was charged on a bill of indictment with breaking and entering and larceny, and with receiving stolen goods, knowing them to be stolen. On February 25, 1970, petitioner appeared in the Superior Court of Pasquotank County with counsel and a plea of not guilty was entered. The case was set for trial the next day, but the petitioner failed to appear. He was later apprehended and returned to Pasquotank County jail. He escaped from that jail but was again apprehended and held to await trial. Upon petitioner's motion, a change of venue to Camden County was ordered. The case was eventually tried at the September 21, 1970, Session of Camden. Petitioner was tried only on the charge of receiving stolen property. Petitioner, through counsel, entered a plea of not guilty. From a verdict of guilty and judgment providing for imprisonment, the petitioner appealed. The North Carolina Court of Appeals ordered a new trial. The Supreme Court of North Carolina allowed respondent's petition for Writ of Certiorari, reviewed the decision of the Court of Appeals and reversed that decision. Copies of the opinions of the North Carolina Court of Appeals and the Supreme Court of North Carolina are appended to the petition.

STATEMENT OF FACTS

The questions raised by the petitioner pertain to the testimony of State Bureau of Investigation Agent Wise and the findings of fact and conclusions of law of the trial court upon the *voir dire* examination of Agent Wise. The testimony of Agent Wise upon *voir dire* is set forth in full in the Petition under "Statement of the Case". This testimony may be summarized as follows:

Agent Wise made several visits to petitioner's jail cell during the period from 12 June, 1969, to

15 July, 1969. Each visit was made pursuant to a request by the petitioner. Petitioner asked his help toward getting a smaller appearance bond. The agent tried to contact a judge but was then unable to do so and so advised the petitioner. Petitioner told the agent that he might have some information that would be of interest to the agent in *OTHER* cases. The agent told the petitioner that if he gave him any such information, he would appreciate it. The petitioner still wanted assistance in getting his bond lowered. The agent, on numerous occasions, told the petitioner that he was a police officer and that he could make him no promises, but that if he gave any information in solving any cases, the agent would "let it be known". The agent did not caution the petitioner of his constitutional rights because he did not go to interrogate the petitioner, but went there at the petitioner's request. The agent further testified that "(t)he statements he gave me were voluntary on his part without prompting by me". The petitioner did, in fact, supply the agent with information relative to several other crimes. The agent testified: "My conversation and questioning with the defendant was relative to obtaining information concerning these other crimes when I went to see him. It was during the course of these conversations that he related to me the fact that he had purchased the tools that he sold Mr. Hudson, from a third party, and that he paid $90.00 for them. I did not in any way solicit that information from him and had no knowledge that it was coming until he told me." (The tools sold to Mr. Hudson were the tools involved in this action.) The petitioner offered no evidence on *voir dire*.

The portion of the trial court's findings of fact and conclusions of law upon this *voir dire* to which error has been assigned is set forth in the petition under "Statement of the Case". For the benefit of this Court, these findings of fact and conclusions of law are hereinafter set forth in their entirety.

"Upon objection by the defendant to questions propounded by the Solicitor with respect to any

conversation which the witness had with the defendant, the Court had the jury retire and conducted a *voir dire* examination for the purpose of determining whether or not the statements of the defendant to be offered by the State were voluntarily given.

Upon the evidence offered, and after argument of counsel, the Court makes the following Findings of Fact:

(1) At the time in question Mr. O. L. Wise was an officer of the State Bureau of Investigation, having been employed in that capacity continuously since 1962. That on or about June 12, 1969, the defendant, Muse, sent for Mr. Wise and Mr. Wise, in response to the defendant's request, went to see Mr. Muse who was then in custody in the Pasquotank County jail.

(2) The defendant then told Mr. Wise that he, the defendant, was in jail with bond set at $5,000.00; and he did not understand why his bond was so high; that he could not employ counsel unless he could get out and attend to his job, nor could he support his family; and if he was not released from jail he was likely to lose his job. He requested Mr. Wise to contact the judge and see if he could make bond and go back to work. Mr. Wise attempted to contact Judge Horner (District Court Judge), who was not in the County; whereupon, he went back to the jail and told the defendant there was nothing he, Mr. Wise, could do.

(3) Between June 12 and July 15th, 1969, Mr. Wise had several conversations with the defendant. On such occasions the defendant made statements to Mr. Wise which in part were as follows:

> (a) That he, the defendant, did not break and enter the building; that he did purchase the tools; that he paid $90.00 for the tools, and that he made this purchase in his yard. That the tools in

question were those alleged to have been stolen from City Motor Parts, Inc.

(4) In addition to the conversation about the tools, Mr. Wise and the defendant talked about a number of other things, including other alleged crimes.

Mr. Wise did not initiate the conferences; the defendant on the occasion of each conversation sent for Mr. Wise.

(5) Upon indication that he, the defendant, might have useful information, Mr. Wise advised the defendant that he was a police officer and was interested in any crimes committed in the area, or elsewhere, and that any information of interest which could help him would be appreciated. Mr. Wise advised the defendant that he could not make any promises, but that if he gave any information aiding in solving any cases that he, Mr. Wise, would let it be known.

A (6) At no time did Mr. Wise, the officer, initiate the discussions with respect to the alleged breaking and entering into City Motor Parts, Inc., and the larceny of tools in question. B

(7) No "Miranda warning" was given to the defendant by Mr. Wise. At the time of the alleged conversation the defendant was under arrest and was in custody. C Mr. Wise did not request the defendant to make a statement concerning the alleged breaking and entering of City Motor Parts, Inc., and larceny of tools therefrom. The information and above statements of the defendant were volunteered on the occasions when he called for Mr. Wise and when Mr. Wise talked to him at his request in the Pasquotank County Jail. D

E (8) Mr. Wise did not solicit information from the defendant concerning the City Motor Parts, Inc. case. F

G (9) This was not a custodial interrogation, wherein

the questioning *WAS INITIATED* by a law enforcement officer after the person had been taken into custody, or otherwise deprived of his freedom of action. H

I (10) The defendant is an adult, white male, intelligent, and was, before confinement, employed as a steel tier in construction work. There is nothing to indicate the defendant lacked sufficient intelligence and ability to appreciate his circumstances at the time that the statements in question were made, and nothing to indicate a lack of ability to understand what he was doing. J

K (11) The statements of the defendant were voluntarily and understandingly made. L

WHEREFORE, the Court concludes:

M (a) The statements made by the defendant on the occasions in question concerning the tools taken from City Motor Parts, Inc., were voluntarily and understandingly made and are admissible as evidence in this case. N.

O (b) The statements made by the defendant on the occasions in question do not fall within the prohibition of *Miranda v. Arizona*. P"

This September 23rd, 1970.

/s/ Robert D. Rouse, Jr.
Judge Presiding

ARGUMENT

Petitioner's arguments for granting the writ seemed to center around the following propositions:

(1) The inculpatory statements of the petitioner were inadmissible by reason of being induced by an emotion of hope aroused in the petitioner by the statements of Agent Wise.

(2) The inculpatory statements of the petitioner were inadmissible because the defendant was not warned that he had the right of counsel and the right to remain silent.

(3) The trial court erred in its *voir dire* findings by failing to make findings with respect to counsel and as to whether or not petitioner indicated the desire to confer with an attorney.

(4) The inculpatory statements of the petitioner were inadmissible because his right to remain silent and his right to counsel were not knowingly and intelligently waived with full knowledge of the nature and consequences.

It is submitted by the respondent that the applicability of any of these principles to the case at bar turns upon whether the inculpatory statements made by the petitioner to Agent Wise were made in response to interrogation of the petitioner by the agent concerning the offenses charged. If there was no such interrogation, it would appear that all of petitioner's arguments and contentions are without merit.

The testimony of Agent Wise on *voir dire* must be considered contextually. Each of the agent's several visits to the petitioner in jail were as a result of the petitioner's requests to see him. The petitioner volunteered information concerning *OTHER CASES*, and it was such information that the agent indicated he would appreciate and would let be known. The petitioner did, in fact, give information concerning *OTHER CASES*. With respect to the petitioner's inculpatory statements, Agent Wise testified that, "I did not in any

way solicit that information from him and had no knowledge it was coming until he told me". When the *voir dire* testimony is considered contextually, it is apparent that the conversations between the agent and the petitioner were with reference to *OTHER CASES*, that there was no interrogation concerning the offenses charged, and that any statements made by the agent to the petitioner were with reference to information concerning *OTHER CASES* and could not have been interpreted by the petitioner in any other manner.

The respondent contends and it was found by the Supreme Court of North Carolina in its opinion concerning this matter that there was plenary evidence to support the findings of fact made by the trial judge. These findings of fact are set forth in full under the heading: "Statement of Facts" in this Response.

I

THE INCULPATORY STATEMENTS OF THE PETITIONER WERE NOT RENDERED INADMISSIBLE ON THE THEORY THAT THEY WERE INDUCED BY AN EMOTION OF HOPE AROUSED IN THE PETITIONER BY THE STATEMENTS OF AGENT WISE.

The opinion of the Court of Appeals of North Carolina, which ordered a new trial for petitioner, and which was reversed by the Supreme Court of North Carolina, turns upon its determination that, as a matter of law, the petitioner's admission that he purchased the goods in question was prompted by an emotion of hope and was thus involuntary. It relies upon the well-established proposition that a confession induced by hope or extorted by fear is to be rejected. So far as can be ascertained, however, this rule has consistently been applied to factual situations involving an interrogation of defendant concerning the offense with which the defendant was charged or would later be charged.

The Court of Appeals, in support of its holding, relied upon the cases of *State v. Fuqua*, 269 N.C. 223, 152 S. E. 2d 68; *State v. Woodruff*, 259 N.C. 333, 130 S. E. 2d 641; *State v. Gibson*, 2 N.C. App. 187, 162 S. E. 2d 627; and *State v. Roberts*, 12 N.C. 259. All of these cited cases involved factual situations wherein the defendants were actually interrogated about the offense

for which they were eventually convicted, and the representations or promises made in these cases which may have induced those defendants to make the incriminating statements were made specifically with reference to the offenses for which the defendants were convicted. The *FUQUA*, *GIBSON* and *ROBERTS* cases involved actual in-custody interrogation concerning the offense charged wherein certain statements or promises were made bearing directly on attempting to induce the defendants to confess. The *WOODRUFF* case involved a promise by the Sheriff to try to help defendant if the defendant would give information concerning a certain murder if it developed that defendant was involved in the murder. The evidence suggested that the Sheriff was suspicious that the defendant was involved at the time he made these promises.

In the case at bar, the uncontradicted evidence is to the effect that there was absolutely no interrogation of the petitioner concerning the offenses charged. If the agent's statements to the petitioner could be construed as arousing an emotion of hope in the petitioner for some assistance, there is nothing in the record to indicate an understanding on the part of the agent or the defendant that such assistance would be in return for a confession or statement implicating the petitioner in the offenses charged.

It has been held by the Supreme Court of North Carolina that the test to determine whether a confession is voluntary " is whether it was made under circumstances that would reasonably lead the person charged to believe that it would be better to confess himself guilty of a crime that he had not committed " *State v. Grier*, 203 N. C. 586, 166 S. E. 595; *State v. Hudson*, 218 N. C. 219, 10 S. E. 2d 730. Certainly none of the circumstances revealed by the record could reasonably lead the petitioner to believe it would be better to confess to a crime he had not committed.

The respondent submits that, in the context of the discussion, no statement made by Agent Wise could be interpreted as inducing a confession of the petitioner by raising an emotion of hope. If an emotion of hope was raised, it was not done pursuant to an interrogation concerning the offense charged. Consequently, petitioner's arguments with respect to this proposition appear to be without merit.

II

THE INCULPATORY STATEMENTS OF THE PETITIONER WERE NOT RENDERED INADMISSIBLE BECAUSE THE DEFENDANT WAS NOT WARNED THAT HE HAD THE RIGHT TO COUNSEL AND THE RIGHT TO REMAIN SILENT.

This argument seems to be answered by the case of *Miranda v. Arizona*, 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694. In the next to the last paragraph of Sec. 3 of this opinion it is stated that

> ". . . Any statement given freely and voluntarily without any compelling influence is, of course, admissible in evidence. The fundamental import of the privilege while an individual is in custody is not whether he is allowed to talk with the police without benefit of warning, but whether he can be interrogated. There is no requirement that police stop a person who enters a police station and states he wishes to confess to a crime, or a person who calls the police to offer a confession or any other statement he desires to make. Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today."

It must be remembered that the uncontradicted evidence is to the effect that there was no interrogation of the petitioner concerning the offenses charged. All of the agent's visits to petitioner were at the petitioner's request, all conversations were initiated by petitioner, and all conversations between the petitioner and the agent were concerning *OTHER CASES* with reference to which petitioner had offered the information. With reference to the inculpatory statements of the petitioner, the agent testified that, "I did not in any way solicit that information from him and had no knowledge that it was coming until he told me."

Since there was no interrogation, there was no necessity, at this time, to advise the petitioner of his constitutional rights.

III

THE TRIAL COURT DID NOT ERR IN ITS *VOIR DIRE* FINDINGS BY FAILING TO MAKE FINDINGS WITH RESPECT TO COUNSEL, AND AS TO WHETHER OR NOT PETITIONER INDICATED THE DESIRE TO CONFER WITH AN ATTORNEY.

In order for petitioner's arguments upon this point to possess validity, it is submitted that he must have had the right to counsel at the time of, or before, he made the statements to Agent Wise. It is believed there is no authority which would have entitled the petitioner to representation by counsel under the circumstances and at the time that the statement was made. The record will show that the petitioner's preliminary hearing was held on June 5, 1969. This was prior to the effective date of North Carolina General Statute 7A-451 which declared a preliminary hearing to be a critical stage so as to entitle an indigent person to the service of counsel. The effective date of this statute was July 1, 1969. In-custody interrogation is declared by this section to be another such critical stage. Again, the State submits, there was no in-custody interrogation of the defendant. *Coleman v. Alabama*, 399 U. S. 1, 90 S. Ct. 1999 (1970), 26 L. Ed. 2d 387, deals with defendant's constitutional rights to counsel at the preliminary hearing. This case was decided June 22, 1970. Federal Courts in at least three circuits have refused to apply the ruling in *Coleman* retroactively. *Phillips v. State of North Carolina*, 433 F. 2d 659 (4th Cir. 1970); *Konvalin v. Sigler*, 431 F. 2d 1156 (8th Cir. 1970); *United States ex rel Bonner v. Pate*, 430 F. 2d 639 (7th Cir. 1970).

Petitioner did not request an attorney at the time of his conversations with Agent Wise and, under the law as it existed at that time and the facts and circumstances of this case, there being no interrogation, he would not have been entitled to an attorney had one been requested. Therefore, it is submitted that petitioner's arguments and contentions with reference to this proposition are without merit.

IV

UNDER THE FACTS OF THIS CASE THE INCULPATORY STATEMENTS OF THE PETITIONER WERE NOT

RENDERED INADMISSIBLE BECAUSE HIS RIGHT TO REMAIN SILENT AND HIS RIGHT TO COUNSEL WERE NOT KNOWINGLY AND INTELLIGENTLY WAIVED WITH FULL KNOWLEDGE OF THE NATURE AND CONSEQUENCES.

Petitioner relies upon excerpts from American Jurisprudence 2d as authority for his contentions on this point. It is believed that none of the cases cited for the broad propositions stated in these excerpts are in point. Petitioner cites 29 Am. Jur. 2d, Evidence, Sec. 529 at page 580 as authority for the proposition that a confession, to be admissible, must be made " with full knowledge of the nature and consequences of the confession." Respondent submits that the case law will limit this proposition to cases involving interrogation concerning the offense charged. *Miranda v. Arizona*, supra, deals exclusively with cases involving actual in-custody interrogation. The case of *State v. Thorpe*, 274 N. C. 457, 164 S. E. 2d 171, cited by the petitioner in support of this proposition, involved actual, active, in-custody interrogation.

The case of *Carnley v. Cochran*, 369 U. S. 506, 82 S. Ct. 884, 8 L. Ed. 2d 70, cited on page 19 of the petition, involves the question of waiver of right to counsel at trial. The record will show that petitioner had counsel at trial. The respondent has previously shown that petitioner was not entitled to counsel at the time and under the circumstances of his conversations with Agent Wise.

Petitioner also relies on the case of *U. S. v. Blalock*, 255 F. Supp. 268 (E. D. Pa. 1966). That case involved an active, positive request by federal agents to search a room without a search warrant. During the search incriminating evidence was found. There, the Court states that, "(i)n order to constitute a voluntary consent it must clearly appear that the search was voluntarily permitted or expressly invited and agreed to by the person whose right is involved." In the case at bar, the conversations between petitioner and Agent Wise were expressly invited and agreed to by the petitioner.

It is earnestly contended by the respondent that the uncontradicted testimony of Agent Wise on *voir dire* and the findings

of fact by the trial court unequivocally show that there was no interrogation of the petitioner concerning the offenses charged, and that, therefore, the contentions of the petitioner with respect to this proposition are without merit

CONCLUSION

For the reasons set forth above it is respectfully submitted that the petition for writ of certiorari should be denied. To hold otherwise would necessitate a finding that the conversations between Agent Wise and the petitioner amounted to in-custody interrogation concerning the offense charged. A reading of the cases, and specifically the case of *Miranda v. Arizona*, supra, reveals that the courts, and specifically this Court, were concerned with oppressive methods and tactics used by law enforcement officers in an active interrogation. The facts in the case at bar in no way approach the factual situations dealt with in *Miranda*, or any other case of which respondent is aware, with reference to abuse of petitioner's constitutional rights. The respondent submits that the facts of this case showed no violation of petitioner's rights, constitutional or otherwise.

Respectfully submittted,

ROBERT MORGAN
Attorney General of North Carolina

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